Filed 12/29/04 In re Rudy L. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Rudy L. et al., A Person Coming Under The Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Leticia L., Carl L., Defendant and Appellant.	B175713 (Los Angeles County Super. Ct. No. CK18073)

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn K. Martinez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Merrill L. Toole, under appointment by the Court of Appeal, for Plaintiff and Respondent, Rudy L.

Steven D. Schatz, under appointment by the Court of Appeal, for Defendant and Appellant, Leticia L., Carl L.

In this Welfare and Institutions section 300 dependency case, the dependent children are Leticia L. and Rudy L. Carl L. is the children's father (Father), and Leticia L. is their mother (Mother). Both parents have appealed from an order that terminated their parental rights as to the minors.[1] Both parents assert "ICWA error.[2] Both also contend the dependency court erred in not conducting a hearing under section 366.26, subdivision (c) (1) (A) on whether terminating their parental rights would be detrimental to the minor children.[3] Additionally, Father contends his due process rights were violated when the court did not allow a hearing on his section 388 petition to modify or set aside the order that terminated his family reunification services and set the case for a section 366.26 hearing.

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[1] Unless otherwise indicated, all references herein to statutes are to the Welfare and Institutions Code.

[2] The term "ICWA" refers to the Indian Child Welfare Act of 1978 (25 U.S.C. s4 1901 et seq.).

The Department's detention report states Mother and Father were interviewed about possible Native American heritage and both indicated that to their knowledge, they do not have such heritage. The Department concluded the ICWA does not apply. At the detention hearing, the court asked Mother and Father if either of them were "registered with an American Indian tribe," and both stated they were not. Like the Department's detention report, the October 23, 2001 jurisdiction/disposition report stated the ICWA does not apply in this case, as did subsequent reports filed by the Department.

[3] Section 366.26, subdivision (c) (1) (A) states that certain findings set out in subdivision (c) (1) which the trial court may make "shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to . . . [¶] (A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Our review of the record shows no ICWA error, no error in summarily denying Father's section 388 petition, no error when the trial court declined to hold a hearing on the question whether terminating the parents' parental rights would be "detrimental to the child[ren]," as that phrase is used in subdivision (c) (1) (A) of section 366.26, and no error in terminating the parents' parental rights. We will therefore affirm the order terminating those rights.

BACKGROUND OF THE CASE

1. *The Dependency Petition*

The minors came to the attention of the Department of Family and Children Services of the County of Los Angeles (the Department) in September 2001, via a referral from a child abuse hotline, when Rudy L. (8/97) had just turned four years old and his sister Leticia L. (11/1999) was just two months shy of being two years old.

The dependency petition was filed on September 19, 2001. As amended and sustained, the petition alleged Father and Mother have a history of domestic violence and such conduct endangers the children's physical and emotional health and safety. The amended sustained petition further alleged (1) Mother's act of leaving a razor blade where the minor Leticia L had access to it and placed it in her mouth did also endanger the children's physical and emotional well being; and (2) the children were also put at risk of physical and emotional harm by the fact that Mother failed to reunify with four of her other children (born in 1982, 1983, 1986, and 1990, respectively), after they were made dependents of the court. (Those four children ultimately received permanent placement services.)

2. *The Detention Report and Detention Hearing*

The detention report describes a dysfunctional home life for this family—Father being physically and verbally abusive to Mother and Rudy L., including threats to kill Mother; Mother and Father constantly arguing; Mother being verbally abusive to Father and hitting him; and Mother's apparent inability to convince herself to permanently leave Father. Prior to the filing of this case, Father had been convicted of stabbing a person to death and had served time for the crime.

The paternal aunt described Mother as having mental difficulties and a difficult time functioning. During the social worker's interviews with Mother, Mother appeared to the social worker to have cognitive deficiencies. Mother had a difficult time understanding and responding to simple questions, she appeared to have a poor short term memory, had difficulty focusing on her conversations with the social worker, and could barely read and write.[4] During the social worker's initial interview with Mother at the shelter, Mother paid little attention to the minor Leticia L. and the social worker had to remind her several times to keep an eye on the child. The social worker received a report from the shelter that Mother had left Leticia L. unattended and the minor had obtained a razor blade from Mother's purse and put it in her mouth.

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[4] The director of the domestic violence shelter where Mother was then living with the minor Leticia L. stated Mother had difficulty with comprehension and was unable to follow simple instructions. The therapist at the shelter believed Mother has serious cognitive deficits but the therapist did not know their cause. An examination of Mother's previous case history revealed that she had a history of drug and alcohol abuse, and the maternal grandmother also reported that Mother and Father have a history of using drugs.

The minor Rudy L. and Father were living at the home of the paternal grandmother. Mother reported that Father would not let her take Rudy L. with her when she left, and she was concerned about the child's safety since he remained with Father. The paternal grandmother reported that Rudy L. would cry often, was very nervous, and she had trouble understanding him when he spoke. Until Mother left, he was still using a baby bottle. Grandmother was teaching him to use a cup, and he was "beginning to eat." Father denied abusing drugs and hitting or kicking Rudy L.

During the social worker's first interview with Rudy L., he was difficult to understand and had poor eye contact with the social worker. She described him as "a skinny four year old child, with severe dental problems, who . . . was almost nonverbal." He stated his parents do fight "because Mommy is mad." He was dirty and barefooted. He had a bruise on his thigh which he said was caused by a swing. During her second interview with Rudy L., he was more comfortable with her. He told her many times that "Mommy is mad at me." Rudy L. told the social worker that Father kicked him, and demonstrated that he was kicked in his lower back and buttock area.

After the children were detained, their foster mother was interviewed. She described Rudy L. as a very frightened, nervous child who does not mention Mother, who cries often, and who becomes upset when Mother and Father attempt to contact him and has a difficult time recovering. He and his sister Leticia L. are "extremely emotionally bonded" and Rudy L. acts as her protector. The foster mother stated Leticia L. would kick, bite and yell when she became upset.

Not surprisingly, at the detention hearing on September 19, 2001, the dependency court found a prima facie case for detaining the minors. The court found the children are described by subdivisions (a), (b) and (j) of section 300. By the time of the hearing, Mother had left the shelter, sought refuge at the maternal grandmother's home, and Father had found her there, called her a "bitch," and told her she was going to die and he was going to keep the minors.

3. *The Pretrial Resolution Conference*

The Department's jurisdiction/disposition report for the October 23, 2001 pretrial resolution conference shows that Mother left her mother's home and was admitted into a shelter in San Bernardino County where she was making progress and actively participating in therapy. However, she resumed contact with Father and continued to pursue a relationship with him. The report states there was no evidence she was currently using drugs, and she had completed the drug counseling and drug testing that were ordered in 1995 in connection with her prior dependency case when her other children were detained; she had also completed parenting education in that prior case. However, Mother never reunified with those children because she did not have appropriate housing for them and they did not want to return to her care; moreover, by that time she was involved in this difficult relationship with Father.

The Department recommended that no reunification services be ordered for Mother. The Department cited section 361.5, subdivision (b) (9), but apparently meant (b) (10)—a parent's failure to reunify in the past with a minor child's siblings or half-siblings.

For Father, the Department recommended he be ordered to participate in a 52-week domestic violence course, including group therapy, individual therapy and anger management, and in drug rehabilitation counseling, drug testing and NA meetings.

At the October 23, 2001 pretrial resolution conference, Mother and Father submitted on the amended petition and the Department's reports and documentation, and the court found the minors are children coming within the provisions of subdivisions (b) and (j) of section 300. A contested disposition was set for December 6, 2001.

4. *The Disposition Hearing*

The supplemental jurisdiction/disposition report ~ct 104~ shows that Mother was terminated from the domestic violence shelter in San Bernardino because she continued to have contact with Father and was not attending domestic violence classes. She moved to El Monte to live with her sister. A December 5, 2001 letter from the shelter states she began the in-house resident program on September 24, completed the self defense, abuser profiles, adult re-entry, tobacco reduction, domestic violence video, nutrition, housing authority, and domestic violence/why victims stay classes, but did not complete the in-house resident program. A December 4, 2001 letter from "Grace Center" which apparently is an organization which addresses family violence issues, states Mother's progress, participation and attendance in their counseling was "fair." It shows an intake date of November 18, 2001. A December 5, 2001 letter from a church states Mother enrolled in its parenting program on November 7, 2001 and had completed five group sessions.

At the December 6, 2001 disposition hearing, the court declared the minors dependent children of the court pursuant to subdivisions (b) and (j) of section 300 and found that removal of custody from the parents was necessary. Mother argued that subdivision (b) (10) of section 361.5 (regarding denial to her of reunification services in the instant case), does not apply to her in that in her prior dependency case, she completed all court ordered programs, her hang-up in that case was that she did not have housing for the children, she was in agreement that there could be a custody order to someone other than her, the case closed because those children were to be placed in the custody of their father/stepfather, and she continues to maintain a relationship with those children. The Department argued against reunification services for Mother in the instant case, saying that besides not having housing in the prior case, Mother had also not complied with the order to have mental health services in that case, and further Mother has indicated her intent to return to Father.

The court declined to order reunification services for Mother, based on the prior nonreunification and termination of services with her other children, and the court's finding that there is no clear and convincing evidence that it would be in the children's best interest for Mother to have reunification services in this case (§ 361.5, subd. (c)), due to a lack of a bond between Mother and the minors. However, the court indicated that it would order Mother to continue her programs, and she could file a section 388 petition at an appropriate time.

The court ordered both parents to attend an approved program of domestic violence counseling as well as individual counseling to address domestic violence,

conjoint counseling if they intended to remain a couple, and parent education. Father was also ordered to 12 random consecutive drug tests, and a drug program if he missed or tested dirty.

The court set a six-month judicial review date of June 6, 2002.

5. *Subsequent Review and Section 366.26 Hearings*

After the disposition hearing, there were review hearings in June and December 2002. In April 2003 the court ordered the minors into long term foster care and reviewed that plan in July and October 2003 (reunification services were terminated at the latter hearing and permanent placement services were ordered). Thereafter, there were section 366.26 hearings in January, April and May 2004. During that space of time from disposition to the last section 366.26 hearing, Mother and Father reunited and then split up again several times. Mother reported at various times that Father was being physically and verbally abusive to her and threatening her relatives; at the January 2004 hearing Father denied he was harassing Mother.

Also during that time, the Department's reports showed that the parents did not control the minors during their monitored visits, but rather the children controlled the parents. The children threw tantrums when they did not get their way, ignored the parents' directives, and hit the parents and threw things at them. Despite the fact that (1) both of the children needed to improve their speech and language skills, (2) Rudy L. was assessed twice, with the parents present, and found to have a significant speech delay problem which impeded his academic progress, and (3) techniques to improve Rudy L.'s

speech were discussed at the assessments, the parents resisted providing good speech models when talking with the children and instead continued to speak baby talk to them.

During the reunification and section 366.26 periods, the children received psychological counseling with a therapist to help them process the breakup of their family and their placement in foster care, and overcome their aggressive behavior. The foster parents continued to report that the children's behavior would worsen after they return from visits with the parents. Father threatened to kidnap the children if they were not returned to his care by the court.

The reports state that the minors were affectionate with their parents when they visited, enjoyed seeing their parents, and were sad when the parents would cancel visits. During many of the visits, the children played together for much of the visitation period rather than interact with the parents because the parents lost interest in them, and when the parents did pay attention to the children, Father tended to interact with Rudy L. and Mother with Leticia L. However, as the weeks wore on towards the court's section 366.26 decision, Father spent more time with the children at his visitations and Mother preferred to talk to the monitor about her problems. Also after the reunification period ended, the parents would tell the minors about how things would be when the minors come home to live with the parents.

The children enjoyed their foster families—the DeLeons and the Alcarezes. When Leticia L. was at the DeLeon foster home (the home of the prospective adoptive parents, where the children stayed from February 2002 to February 2003), she was very affectionate toward her foster parents, whom she liked to hug. Rudy L. was reported to

be well adjusted to the DeLeon home, and he referred to both the DeLeons and to his birth parents as "Mom" and "Dad." The minors are also bonded with the DeLeon's three adult sons. Rudy L. was reported to initiate affection with his birth parents, his foster parents, and his social workers. The minors were sad to leave the DeLeon's home when they were replaced to the Alcarez foster home, however they made progress in their new home, and Leticia L. was reported to like to sit by foster mother Alcarez and hold her hand.

Mother and Father completed parenting classes. However, after the many reports concerning how they did not control the children at visitation time, the court suggested the parents enroll in another parenting class. Mother attended group family counseling and had a good report. She was reminded by the court that she was ordered at the disposition hearing to attend individual counseling for domestic violence and conjoint counseling with Father, if they intended to stay a couple. Father was also reminded that he was ordered to attend such programs. He then enrolled in domestic violence group counseling. A year after the disposition hearing, Father's attorney informed the court that Father could not afford all of the programs at one time and so had been enrolling in a new one when he completed another. Soon thereafter (December 21, 2002), the parents enrolled in joint counseling and individual counseling and Father continued his group counseling. Within six months, the individual/conjoint counseling therapist reported the parents were missing sessions. In another few months, the Department's report stated the parents were meeting with their therapist sporadically and not making progress towards resolving the problems that led to the children being detained.

6. *Father's Section 388 Petition*

On January 28, the initial scheduled date of the section 366.26 hearing, Father filed a section 388 petition, seeking a modification of the October 1, 2003 order that terminated his family reunification services and set the case for a section 366.26 hearing.[5] The petition alleged the following change of circumstances/ new evidence. First, whereas the children had four placements since the dependency petition was filed, Father is the only consistent person in their lives. He visits them regularly, and he would care for them under all circumstances, not like the prospective adoptive parents who had the children removed from their home when their own personal lives became difficult. Also, Father has permanently separated from Mother, he has an apartment, has completed court ordered programs, and has "good letters from counselors." Regarding those letters, Father submitted a letter from one Beverly B. Frank, Psy.D., the clinical program director

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[5] Section 388 states in relevant part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself though a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction.

". . . . . .

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, . . ."

California Rules of Court, rule l432 provides in relevant part: "(b) If the petition fails to state a change of circumstance or new evidence that might require a change of order or termination of jurisdiction, the court may deny the petition ex parte. [¶] (c) If the petition states a change of circumstance or new evidence and it appears that the best interest of the child may be promoted by the proposed change of order or termination of jurisdiction, the court may grant the petition after [holding a noticed hearing]."

at Catholic Charities. Ms. Frank stated Father had become a client of that agency on November 18, 2003, had one intake/assessment session and five individual sessions, had been candid about his past and his problems and worked hard to improve his parenting skills and become aware of the responsibilities of caring for children, and on that basis, Ms. Frank formed the opinion that he would work hard to be a good father and provide a safe and loving home, there was no reason to believe Father would be a danger to his children, and it would be safe for the children to be returned to him.

At the January 28 hearing, the court denied the section 388 petition, saying the letter from Catholic Charities was insufficient evidence to support the petition. The court also noted that Father had completed parenting classes two years earlier and yet he continued to have a relationship with Mother thereafter that was "fraught with conflict."

7. *The Final Section 366.26 Hearings*

On January 28, 2004, the court continued the section 366.26 hearing for a report on the progress of an adoptive home study. At the April 28 section 366.26 hearing, the parents' attorneys asked that the section 366.26 hearing be set for a contest on the issue of detriment to the children if parental rights are terminated (§ 366.26, subd. (c) (1) (A)) . The attorneys argued that despite the fact that years have gone by since the children were removed from the parents' home, the Department's reports acknowledge that the children are still bonded to the parents and thus it would be to the children's detriment to no longer have the parents in their lives as their parents.

The Department disagreed, arguing that although the reports indicate the children enjoy their visits with Mother and Father, the reports also consistently show that the

parents do not have appropriate parental responses to the children's negative behavior during the visits, and the law is clear that a child's enjoyment of visitation with his or parents is insufficient reason to not terminate a parent's rights and to prohibit the child from being adopted. The children's attorney asked that parental rights not be terminated until the adoption home study is completed. The Department indicated that the home study would be completed within a week.

Regarding the parents' request for a contested section 366.26 hearing, the court analyzed that while the parents visit regularly, the visits are still monitored and the quality of the visits is poor.[6] Moreover, while there is affection shown between the children and the parents, the parents still have not demonstrated they can set behavior limits for the children, the children return to their foster home aggressive, and the parents talk to the children about the children coming home even though that is not the plan for the children. The court agreed with the Department that while the children enjoy the visits, that is not sufficient reason to not terminate parental rights, and there is no evidence of detriment to the children if the rights are terminated.

Father's attorney argued that the Department's most current report states there is a bonded and loving relationship with the parents, especially with Father, and thus the relationship is more than just the children enjoying visits with the parents. The attorney further argued that the Department recognized the important child-parent bond when the Department recommended that the court limit the amount of the parents' visitation with

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[6] At one point in time, April 2, 2003, the trial court granted unmonitored visitation but it did not work out and three months later, the court ordered visits would again be monitored.

the children so as to facilitate the children's emotional health when they transfer from the parents to the adoptive parents.

The court ruled that the parents' offer of proof was insufficient to convince the court that the matter should be set for a contested hearing under section 366.26, subdivision (c) (1) (A), saying that while a friendly relationship is beneficial, it is not sufficient to deprive a child of an adoptive home, and there is no evidence that the bond and love Rudy L. and Leticia L. feel for their parents "is a significant, positive, emotional attachment other than a familiar and friendly relationship." The court continued the case to May 25 for completion of the home study.

The Department's May 25 report states the social worker was informed by the adoptive worker that the home study was completed and approved as of May 6, 2004 and on that basis, the Department recommended that the parents' parental rights be terminated and adoptive placement be completed.

The report states that after the April 28 hearing, the foster family social worker heard Father say that he knows where the prospective adoptive parents live and if the court does not return the children to Father, Father will take the children from the adoptive parents, and do it by force if necessary.

At the May 25 section 366.26 hearing, Mother's attorney offered proof, via a video tape of her two most recent visits with the minors, of the bonding she has with them, and the attorney asked that the court reconsider its denial of a contested hearing. Father's attorney joined in that request. The Department objected to the request for reconsideration, saying that proof of a bond was not sufficient to justify a contest. The

court reminded the attorneys that it had already ruled that a friendly, familiar relationship between parent and child is not sufficient reason to find it would be detrimental to terminate parental rights, and thus, the court needed more details about the videotape offer of proof. Mother's attorney indicated she had not seen the tape and that Mother had told her the tape shows how bonded the children are to the parents and how they were happy and responding to the parents. The court denied the request for a contested hearing.

In deciding whether to terminate the parent's parental rights, the court balanced the positive aspect of the children's encounters with the parents during the visits against the benefit to be gained from having a permanent home that adoption would provide to the children, and the court determined there was no evidence of a significant parent—child relationship such that the parents occupy a parental role rather than a loving frequent contact role, and the happiness experienced by the children at their visits with the parents is not significant enough to outweigh California's strong preference for adoption.

The court found the children would likely be adopted, there was no evidence it would be detrimental to the children to have parental rights terminated, and the court terminated Mother's and Father's parental rights. The court authorized the social worker to arrange and monitor at least one additional visit between the minors and Mother and Father for closure, and such visit was to be terminated if the parents made inappropriate statements.

The parents each filed a timely notice of appeal from the order terminating their parental rights.

ISSUES ON APPEAL

In this appeal, Mother and Father assert ICWA error. Additionally, Father contends his due process rights were violated when the court did not set a hearing on his section 388 petition. Both Father and Mother contend the court erred when it did not set a contested hearing on the question whether subdivision (c) (1) (A) of section 366.26 applies here such that it would be detrimental to the minors to terminate parental rights. Mother asserts the court erred in terminating her parental rights.

DISCUSSION

1. *There Is No ICWA Error In This Case*

The ICWA was enacted because of the alarmingly high number of Native American children who were being removed from their families and tribes by abusive child welfare practices and placed in adoptive or foster care homes which were usually non-Native American homes. (*Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30, 32 [104 L.Ed.2d 29, 36, 109 S.Ct. 1597].) "In passing the Act, Congress identified two important, and sometimes independent policies. The first, to protect the interests of the Indian child. The second, to promote the stability and security of Indian tribes and families." (*In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1421.)

"At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings

concerning an Indian child 'who resides or is domiciled within the reservation of such tribe,' as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: . . ." (*Mississippi Choctaw v. Holyfield*, *supra*, 490 U.S. 30, 36, fn. omitted.)

Section 1911(b) of the ICWA states: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." Additionally, section 1911(c) states: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."

Obviously, in order for a tribe to exercise its rights under section 1911, the tribe must receive notice of the state court proceedings. "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1421.) "The Indian status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the

child is an Indian child." (*Id*. at p. 1422; accord *In re Nikki R*. (2003) 106 Cal.App.4th 844, 848, where the court stated that because it is the tribe that determines a child's Native American status, "the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.")

Regarding notice to tribes, section 1912(a) of the ICWA states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary; *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding."

In *In re Aaliyah G*. (2003) 109 Cal.App.4th 939, 942, a box on the dependency petition was marked "No" to show that the subject minor child did not have Indian heritage. Thereafter, the Department's reports each stated the ICWA did not apply in that case, and neither the parent nor the minor's relatives indicated anything to the contrary. The reviewing court held this discharged the affirmative duty of the Department and the

dependency court under the ICWA and the corresponding rule of court (Cal. Rules of Court, rule 1439 (d)). "Checking the "No" box suggests that an inquiry as to Aaliyah's heritage was made. There is no indication to the contrary. *The court had no obligation to make a further or additional inquiry absent any information or suggestion that the child might have Indian heritage*. . . . [¶] Based on the record, there is sufficient evidence that an inquiry was made as to whether Aaliyah is an Indian child. The record also contains no indication that Aaliyah has such heritage. We therefore conclude that there was no violation of ICWA." (*Id*. at pp.942-943, italics added.)

As noted above, in the instant case, the Department's original report—the detention report—*specifically states* that the Department asked both Mother and Father if they have any Native American heritage, and the parents indicated that to their knowledge, they do not. If checking a "No" box is sufficient to discharge the obligation of the agency and the court respecting ICWA inquiry absent evidence that an inquiry was not actually made and absent information or suggestion that there might be Native American heritage, then a specific indication in the detention report that the social worker made ICWA inquiry of the parents Native American heritage must necessarily also discharge the Department's and the court's duty to inquire about the matter any further, absent any information or suggestion by someone or something that the children might have Native American heritage or that such inquiry was not actually made. "After all, if a parent says he or she has no Indian ancestry, that is usually the end of the matter." (*In re Christopher W*. (2004) 122 Cal.App.4th 1331, 1337.)

The fact that the trial court, at the detention hearing, asked Mother and Father if either of them were "registered with an American Indian tribe" rather than the more inclusive question whether either of them have Native American heritage does not change our analysis. Since the duty of the court and the Department was already satisfied by the time the court's inquiry was made, the *limited* inquiry of the court which the parents assert on appeal was a violation of the court's duty (that is, asking whether the parents were registered with a tribe rather than whether they had Native American heritage) would not "unsatisfy" the court's duty. Thus, we find no ICWA error.

2. *There Was No Abuse Of Discretion In The Trial Court's Summary Denial of Father's Section 388 Petition, Moreover Father Failed To File A Notice Of Appeal From The Order Denying His Petition*

There are two reasons for not reversing the order that summarily denied Father's section 388 petition. First, it was an appealable order and he failed to appeal from it. Second, there was no abuse of discretion when the trial court summarily denied the petition. While the first reason precludes our ability to grant Father relief from the order summarily denying his petition, even if such order was improperly granted, we will nevertheless, for Father's benefit, explain why there was no abuse of discretion in the *summary* denial of his petition, that is, in the denial of the petition without first having a full hearing on it.

Once family reunification services are terminated, the focus of a dependency case shifts from reunification of parent and child to the needs of the child for permanency and stability, and a section 366.26 hearing is set. (*In re Marilyn H*. (1993) 5 Cal.4th 295, 309.) Section 388 "accommodate[s] the possibility that circumstances may change after

the reunification period that may justify a change in a prior reunification order. A petition pursuant to section 388 may be used to raise the issue in the trial court prior to the section 366.26 hearing." (*Ibid*.) For example, "when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights," section 388 acts as an "escape mechanism" for the parent whereby the parent can seek reunification. (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 528, 529.)

Section 388 petitions must be "liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H*., *supra*, 5 Cal.4th at p. 309-310.) The parent's petition need not "establish a probability of prevailing on her petition." (*In re Jeremy W*. (1992) 3 Cal.App.4th 1407, 1414.)

The prima facie showing involves two parts. The person filing the section 388 petition must show a genuine change of circumstances or new evidence, and must show that modifying or revoking the subject prior order would be in the child's best interests. (*In re Anthony W*. (2001) 87 Cal.App.4th 246, 250.) If the petition presents any evidence that the modification of an order would promote the best interests of the child, the court should grant a hearing. (*In re Heather P*. (1989) 209 Cal.App.3d 886, 891.) "[A] hearing may be denied only if the application fails to reveal any change of circumstance or new evidence which might require a change of order." (*In re Jeremy W*., *supra,* 3 Cal.App.4th at p. 1414.)

As noted above, at the January 28 section 366.26 hearing, the court summarily denied Father's section 388 petition, saying the letter he presented from the Catholic Charities therapist was insufficient evidence to support the petition. The court also noted that Father had completed parenting classes two years earlier and yet he continued to have a relationship with Mother thereafter that was "fraught with conflict." We find no abuse of discretion in the court's ruling that Father's section 388 petition did not rise to a prima facie showing requiring a full hearing on the petition.

The letter from the Catholic Charities therapist who had only met with Father six times was scant evidence. It is a six sentence letter that does nothing to indicate that the therapist had a true picture of the facets of this case that caused the Department and the court to become involved in the family's life. The therapist was meeting with a man whose children had been removed *two years earlier* and who had not, in those two years, demonstrated to the court that his children would not be put in harm's way if they were returned to him. The letter lacks facts to support its conclusion that the children could safely be returned to Father's care. Moreover, Father's assertion in his petition that he had "permanently separated from Mother" was overwhelmingly burdened with his history of an on-again/off-again turbulent relationship with Mother. Thus, there was no prima facie change of circumstances/best interests showing made by Father, and thus no abuse of discretion in summarily denying his petition.

3. *The Trial Court Did Not Err When It Refused To Hold A Contested Section 366.26 Termination Of Parental Rights Hearing, Nor When It Terminated Mother's And Father's Parental Rights*

a. *The Status Of The Law, The Parents' Positions, And The Trial Court's Decision*

At a section 366.26 selection and implementation hearing, there are three possible plans for the dependent child—an adoption plan, legal guardianship, and long term foster care. Adoption is the Legislature's preferred plan. If the court finds, by clear and convincing evidence, that the child will be adopted, the court must terminate parental rights and order that the child be placed for adoption "unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the . . . [five] circumstances [set out in subdivision (c) (1) (A) through (E): . . ." (§ 366.26, subd. (c) (1).)

At the April 28 and May 25 section 366.26 hearings, both Mother and Father indicated their desire that the section 366.26 hearing on the termination of their parental rights be a contested hearing on the issue whether termination of the parental rights of either or both of them would be detrimental to the minors. The basis of the parents' assertion of detriment was subdivision (c) (1) (A) of section 366.26, to wit, that termination of parental rights would be detrimental to Rudy L. and Leticia L. because the parents had maintained regular visitation and contact with the minor children such that the children would benefit from continuing the relationship (see fn. 3, *ante*).

When the court convened those hearings, it had before it substantial evidence, via the Department's many reports, respecting the strength and quality of the relationship

between the parents and the minors both prior to detention, and throughout the pendency of the case. At both hearings, the trial court asked the parent's attorneys for an offer of proof as to why a contested hearing was necessary.[7] At both hearings, after listening to the attorneys, including Mother's offer of the videotape of her two most recent visits with the children, which she asserted would show how bonded the children are to her, the court ruled that a contest on the subdivision (c) (1) (A) exception was not necessary because while there is evidence that the children seem to enjoy their visits with the parents and feel love for, and have a bond with their parents, and while the parents' visits are on a regular basis, the children's enjoying the regular visits does not rise to the requisite level of detriment that must occur if the visits are ended because the parental rights are terminated, and does not outweigh the benefit to be gained from the children having an adoptive home. The court stated there is no evidence that the bond between the children and their parents is not simply a "familiar and friendly relationship," no evidence of "any significant, positive parental/child relationship," and "[p]arents must occupy a parental role and not just have frequent, loving contact." The court went on to say: "Case law has found that pleasant, warm, affectionate relationship is on a par with friendly and familiar. And that is not sufficient to deprive a child of an adoptive parent. The happiness does not rise to the level of being significant enough to outweigh the strong preference for adoption." The court also observed "[t]he parents continue to be unable to set age-appropriate limits for the children, unable to meet the children's

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[7] Such a request was not a violation of the parents' due process rights. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120 et seq.)

individual needs" and the parents encourage the children to talk about coming home to live with Mother or Father, even though their returning to the parents is not the plan. The court also noted that the children are aggressive and agitated after the visits.

On appeal, both Mother and Father assert the court erred when it did not allow a contested hearing on the section 366.26, subdivision (c) (1) (A) exception to termination of parental rights. Father contends the trial court based its decision on Father's "history rather than on his current relationship with his children." We do not agree. The reporter's transcript for the two relevant hearings shows nothing of the kind.

Mother asserts that the Department's April 28, 2004 report shows that the bond between the minors and their parents is so strong that the report recommends that their visitation be severely limited so that the children could bond with their prospective adoptive parents. Actually, however, the report suggests that because the parents insist on talking to the children about how things will be when the children come home to live with the parents, the children's visitation should be limited so as to facilitate their emotional health during the transition period between the parents and the prospective adoptive parents. Mother also contends that she has maintained visitation with the minors throughout the pendency of this case and her emotional attachment and bond with the children is significant, positive and substantially beneficial to them, and therefore, the subdivision (c) (1) (A) exception applies in her case and she was entitled to a hearing and her parental rights should not have been terminated.

The court in *In re Autumn H*. (1994) 27 Cal.App.4th 567, 575, interpreted the subdivision (c) (1) (A) " 'benefit from continuing the [parent/child] relationship'

exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [¶] At the time the court makes its determination, the parent and child have been in the dependency process for 12 months or longer, during which time the nature and extent of the particular relationship should be apparent. Social workers, interim caretakers and health professionals will have observed the parent and child interact and provided information to the court. The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the

variables which logically affect a parent/child bond." What will not rise to the level of the subdivision (c) (1) (A) exception is a mere showing of frequent and loving contacts and emotional bonding between parent and child. (*In re Derek W*. (1999) 73 Cal.App.4th 823, 827.)

In addressing a subdivision (c) (1) (A) issue on appeal, the reviewing court applies the sufficiency of the evidence test. We examine the evidence in the light most favorable to the prevailing party, give the prevailing party the benefit of reasonable inferences, and resolve conflicts in the evidence in favor of supporting the order.

b. *Our Analysis Of This Issue*

We begin our analysis of this "detriment to the child" issue with some observations of matters in the appellate record. First, at neither April 28 nor the May 25 hearings did the children's attorney join in the request by the parents for a contested hearing. Rather, the children's attorney's only requests were (1) that parental rights not be terminated unless and until the adoption home study had been completed and approved, and (2) that the visitation between the children and the parents be slowly tapered off because "the children do have a relationship with these parents [and] if a visit is just cut off without any kind of tapering, it might be difficult for the children to process." In contrast, a review of the reporter's transcript shows that in prior hearings, the minor's attorney often sided with the parents' various positions and requests. She was a champion of (1) the children having visitation with their parents, including expanded and unmonitored visitation, (2) there being additional reunification time, and (3) the possibility that the children would be returned to their parents "sooner rather than

later. Moreover, when it was clear adoption would be the goal, it was she that requested at the January 2004 hearing that visitation be tapered off over a series of *several* months. Thus, we find it quite telling that when it came time to determine whether parental rights should be terminated, the minors' attorney did not support the parents' position.

Next, we observe that while Rudy L. and Leticia L. were reported to be affectionate with their parents during their weekly visitation with them, initially, Rudy L. did not feel that way. After the children were detained, their foster mother was interviewed before the detention hearing. She described Rudy L. as a very frightened, nervous child who did not mention Mother, who cried often, and who became upset when Mother and Father attempted to contact him and had a difficult time recovering. Leticia L. was reported to have "some emotional attachment" to Mother. Given that the minors later became affectionate at their visits with Mother and Father, it is not unreasonable to infer that the transformation was due in large part to their being removed from the violence and anger of the parents' home. Since the record is clear that the parents were never able thereafter to sustain even a civil relationship with each other after this case was filed, it does not appear that the visitation was likely to move beyond monitored visits with one parent at a time. Indeed, it was reported that when Leticia L. had unmonitored visits with Mother, her potty training regressed and she would wet herself.

Additionally, the record shows that the minors were comfortable and affectionate with other adults in their lives. Reports from the Optimist foster family social worker and from the Department social worker state that when Leticia L. was at the DeLeon foster

home (the home of the prospective adoptive parents, where the children stayed from February 2002 to February 2003), she was very affectionate, especially toward her foster parents, whom she liked to hug. She was reported to be bonded with the DeLeons. She was reported to like to sit by her new foster mother (Ms. Alcarez) and hold her hand. The report also states that Rudy L. "initiate[s] affection with his birth parents, his foster parents, and with his social workers," that he appears to be well adjusted to the DeLeon home, and he refers to both the DeLeons and to his birth parents as "Mom" and "Dad." The January 28, 2004 report from the Department states the minors are also bonded with the DeLeon's three adult sons. Thus, the minors are children with love and affection to give, and the fact that they give it to the parents does not in and of itself justify not terminating parental rights. While the reports show there were times when the minors were sad to leave the parents after visitation and sad when they could not visit the parents, they were also sad to leave the DeLeon's home when they were replaced to the Alcarez foster home.

Further, the reports of the parental visits do not demonstrate that Mother, Father, and the children acted as a family during the visits. Mother often preferred to talk to the monitor and complain about her life. Often Father would interact with Rudy L. and Mother would interact with Leticia L. The reports also show that there were times when the parents would lose interest in interacting with the children, even though they were only seeing the children once a week, and the children would play by themselves. Additionally, there is no indication that during the visits, the parents spoke about things a parent would naturally be interested in—the children's school/preschool activities,

including what the children were learning at school, who their friends were at school, whether they were doing their homework, and their after school activities. The role of a parent in a child's life should expand as the child comes into new life experiences. Nor is there any indication the children and parents spoke about family matters—such as how the minors' grandparents, uncles, aunts and cousins were doing. The reports simply speak of the parents playing with the children.

Likewise, there was no indication that the parents inquired of Rudy L. about his speech classes, even though they were present for his speech evaluations. Indeed they had to be repeatedly asked not to talk "baby talk" to the children because it was not helpful to the children's speech and language development. As noted earlier, a social worker reported that when Rudy L. was removed from the parents' home, he was a four-year-old who was nearly nonverbal.

Also missing from the visits was the parental discipline that one would expect of parents who wanted their children to mature socially. The reports repeatedly stated that the parents did not make the children mind them and the children controlled the parents, even hit them and threw things at them. The parents were not occupying a parental role in the visits even though the parents had been through parenting classes and Mother had been in parenting classes in her earlier dependency case. Moreover, after the visits, the children's already aggressive behavior at their foster homes and in school would worsen for awhile.

Nor is there any indication in the record that visitation would improve in the near future. The parents had not sufficiently benefited from their parenting classes to even

have family-type visits with the children. The parents had not consistently pursued individual counseling and conjoint counseling to deal with domestic dispute/violence issues. They could not present a stable relationship (whether together or apart) to the court and their children even though they had been in the dependency system in this case for nearly three years. They could not even control their emotions towards one another sufficiently to retain their unmonitored visitation. They gave false information to the children by intimating that the children would be coming home to live with them, and at one visit, Father made the children answer that they wanted to live with him.

It is against this factual background that the trial court was asked to decide whether a contested hearing on the parents' claim of a section 366.26, subdivision (c) (1) (A) exception was necessary. We find there is enough in the record to support the trial court's conclusion that whatever benefit the minors were receiving from their visits with Mother and Father, it was not sufficiently significant that it should deprived them of a permanent, adoptive home.

DISPOSITION

The order terminating Mother's and Father's parental rights is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We Concur:

KLEIN, P.J.

KITCHING, J.